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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BIG RUN STUDIOS INC. and SKILLZ
PLATFORM INC.,

Plaintiffs,

v.

AVIAGAMES INC.,

Defendant.

Case No: 5:21-cv-04656-EJD

**DEFENDANT AVIAGAMES INC.'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO FILE FIRST
AMENDED COMPLAINT**

Date: November 10, 2022
Time: 9:00 a.m.
Courtroom: 4, 5th Floor

Complaint Filed: June 16, 2021
Judge: Hon. Edward J. Davila

AviaGames Inc. (“AviaGames”) opposes Plaintiffs’ Motion for Leave to File a First Amended Complaint (the “Motion”) to (1) substitute one asserted copyright registration with a different one, and to (2) add a conclusory allegation of irreparable harm with no supporting facts. Plaintiffs’ proposed substitution should be denied because they have proffered inconsistent justifications for the substitution that contradict what the registrations show, and those irreconcilable positions suggest bad faith. Plaintiffs’ proposed addition of a threadbare allegation regarding irreparable harm fails as futile under the applicable standards. The Court should thus deny Plaintiffs leave to amend the Complaint on these grounds.

I. PROCEDURAL BACKGROUND

Plaintiffs filed a Complaint for copyright infringement on June 16, 2021. Dkt. 1 (“Compl.”). In the Complaint, Plaintiff Skillz asserted eighteen copyright registrations for “screen displays and textual and visual expressions embodied in those displays” from the Skillz gaming platform, and two copyright registrations for two commercials published “to promote the Skillz Platform and its services.” *Id.* ¶¶ 41-42. Likewise, Plaintiff Big Run asserted five copyright registrations for its Blackout Bingo game. *Id.* ¶ 58.

On August 12, 2021, AviaGames moved to sever Skillz’s claims and to dismiss Plaintiffs’ claims for statutory damages and attorney’s fees because the asserted copyright registrations were not timely and could not support such claims. Dkt. 30. On January 13, 2022, the Court dismissed Plaintiffs’ claims for statutory damages and attorney’s fees. Dkt. 44. The Court stated that “[s]hould Plaintiffs choose to file an amended complaint, they must do so by February 24, 2022. Failure to do so, or failure to cure the deficiencies addressed in this Order, will result in dismissal of Plaintiff’s claims with prejudice.” *Id.* at 11. Plaintiffs did not file an amended complaint by the February 24, 2022 deadline. On February 25, 2022, the Court issued a scheduling order giving the parties until April 26, 2022 to join additional parties “or [make] other amendments to the pleadings” under Rule 15 of the Federal Rules of Civil Procedure. Dkt. 50.

On March 21, 2022, counsel for Plaintiffs circulated a draft amended complaint to counsel for AviaGames and sought its consent to these amendments: (1) substituting one of the

1 asserted Skillz platform copyrights (Reg. No. TX 8-953-926 (the “’926 Registration”)) with a
 2 different one (Reg. No. TX 9-078-072 (the “’072 Registration”), issued February 11, 2022)); (2)
 3 removing Plaintiffs’ request for statutory damages and attorney’s fees; and (3) adding
 4 conclusory allegations that AviaGames’ purported infringement causes irreparable harm to
 5 Plaintiffs, will continue to do so unless enjoined by the Court, and that Plaintiffs have no
 6 adequate remedy at law. *See* Declaration of Chieh Tung (“Tung Decl.”) ¶ 2, Ex. 1; *see also*
 7 Dkt. 52-3 ¶¶ 41, 88. Plaintiffs’ counsel did not provide copies of the registrations at issue or
 8 their deposit materials, or give a reason for changing the copyright registration, stating only that
 9 they sought to “modify” the registrations. Tung Decl. Ex. 1. Plaintiffs also stated that they
 10 added the conclusory allegation of irreparable harm in response to AviaGames’ affirmative
 11 defense of no equitable relief. *Id.*

12 During a March 23, 2022 telephonic meet and confer, counsel for AviaGames asked
 13 Plaintiffs’ counsel why Skillz sought to replace the ’926 Registration with the ’072 Registration.
 14 Tung Decl. ¶ 3. Plaintiffs’ counsel indicated that the ’072 Registration corrected the ’926
 15 Registration. *Id.* But publicly available materials show no relation between these registrations;
 16 in fact, the ’926 Registration has a different supplemental registration (No. TXu 2-302-002).
 17 Tung Decl. ¶ 4, Exs. 2-3.¹ After AviaGames raised this concern again on March 29, 2022,
 18 Plaintiffs’ counsel provided to AviaGames’ counsel copies of the ’072 Registration and
 19 Supplementary Registration No. TXu 2-302-002 (but not their deposit materials). With no
 20 further explanation or acknowledgment of the discrepancy between Plaintiffs’ proffered reason
 21 for substitution and what the registrations showed, Plaintiffs again sought consent to the
 22 amendment. *Id.* ¶¶ 5-6, Ex. 4. On April 5, 2022, AviaGames declined to consent, noting
 23 Plaintiffs’ lack of explanation for the change in registrations, and Plaintiffs’ failure to add any

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 25 ¹ The Court may judicially notice records from the Copyright Office, including copyright
 26 registrations. *See DuckHole Inc. v. NBC Universal Media LLC*, No. CV 12-10077 BRO
 27 (CWx), 2013 U.S. Dist. LEXIS 157305, at *9 (C.D. Cal. Sep. 6, 2013) (“it is common practice
 28 for courts to take judicial notice of copyright registrations”).

facts to plausibly support their addition of a conclusory allegation of irreparable harm. *Id.* Ex. 4. On April 5, 2022, Plaintiffs admitted— again, without elaboration or explanation—that the substitution of the ’072 Registration has nothing to do with the ’926 Registration, but they are instead “for *different works*.” *Id.* (emphasis added).

On April 24, 2022, Plaintiffs filed their Motion, which seeks to: (1) replace the ’926 Registration with the ’072 Registration; (2) add two supplemental registrations to the Skillz commercials; (3) remove the request for statutory damages and attorney’s fees; and (4) add a conclusory allegation of irreparable harm without supporting facts. *See* Dkt. 52-3. As to replacing the ’926 Registration, Plaintiffs’ motion states only that it is to “correct or clarify certain asserted copyright registrations,” and to “comport with correct registration numbers,” but does not explain the basis for the “correction.” Mot. at 5.

AviaGames does not object to Plaintiffs’ removal of their request for statutory damages and attorney’s fees in ¶ 88, or adding two supplemental registrations to ¶ 42 of the Complaint. AviaGames does object, however, to Plaintiffs’ replacement of the ’926 Registration with the ’072 Registration, and Plaintiffs’ addition of a conclusory allegation of irreparable harm as futile.

II. ARGUMENT

A party seeking to file an amended complaint may do so “only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a). Although leave to amend shall be freely given “when justice so requires,” the Court has discretion to deny leave to amend based on factors such as (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) previous amendments. *See Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784, 797 (9th Cir. 2012). Under these standards, Plaintiffs’ motion for leave to amend should be denied with respect to their proposed replacement of the ’926 Registration with the ’072 Registration, and their addition of a conclusory allegation of irreparable harm.

a. Plaintiffs’ Lack of Explanation and Inconsistent Positions on Substituting the ’072 Registration Suggests Bad Faith

A court may find bad faith when a party seeks a proposed amendment with an improper or dilatory motive. *See Ortiz v. Vortex Cellular*, No. 2:19-cv-08184-MCS-AS, 2021 U.S. Dist.

1 LEXIS 32556, at *8 (C.D. Cal. Jan. 19, 2021). Plaintiffs’ inconsistent positions and lack of
 2 justification for the requested amendment suggests an improper motive, and the Court should
 3 deny amendment on this basis.

4 Plaintiffs’ Motion is noticeably silent on the basis for its replacement of the ‘926
 5 Registration, and includes no explanation as to why it now seeks to include a registration for an
 6 entirely “different work[,]” or what the “different work[.]” is. *See* Mot. at 5 (stating only that
 7 Plaintiffs wish to “correct or clarify certain asserted copyright registrations”), Tung Decl. Ex. 4.
 8 Nor did Plaintiffs provide any coherent explanation for this amendment during the parties’
 9 correspondence about it. First, Plaintiffs’ counsel indicated that the ‘072 Registration was to
 10 correct the ‘926 Registration, which AviaGames pointed out on two separate occasions was
 11 incorrect. *Id.* ¶¶ 4-5. The registration documents themselves show that the ‘072 Registration is
 12 unrelated to the ‘926 Registration. *Id.* ¶ 4, Exs. 2-3. Only when AviaGames noted this
 13 discrepancy in writing did Plaintiffs’ counsel admit that the registrations are for “different
 14 works,” but provided no other explanation other than it sought to “correct” the Complaint. *Id.*
 15 Ex. 4.

16 Plaintiffs’ reliance on *Postman v. Spin Master, Ltd.*, No. CV 14-5516-GW(EX), 2015
 17 WL 12747905 (C.D. Cal. Nov. 30, 2015) to justify their amendment is misplaced. In *Postman*,
 18 the defendants did not oppose certain amendments that merely added a registration number and
 19 supplemental registration numbers. *Id.* at *3. But where those defendants opposed proposed
 20 amendments that would add a new category of registration numbers to the complaint, the court
 21 allowed the amendment only after analyzing in detail and verifying the plaintiffs’ claim that the
 22 new registrations contained the same subject matter and content that the parties had been
 23 litigating for months. *Id.* at *4-5. Here, in contrast, although Plaintiffs admit that they want to
 24 assert a “different work” in this case, they have provided no explanation to Defendant or the
 25 Court or any argument showing that the new work involves the same subject matter and content
 26 already under litigation. The Court needs such information to gauge whether “justice requires”
 27 this amendment, and AviaGames has a right to understand the scope of the infringement claims
 28 made against them, which Plaintiffs have confused without reason. *See People.ai, Inc. v. Clari*

1 *Inc.*, No. C 21-06314 WHA, 2022 U.S. Dist. LEXIS 14573, at *12 (N.D. Cal. Jan. 26, 2022)
 2 (denying leave to amend without specifically finding bad faith, but refusing to “endorse
 3 [plaintiff’s] gamesmanship and shifting-sands approach”); *cf. DCD Programs, Ltd. v. Leighton*,
 4 833 F.2d 183, 187 (9th Cir. 1987) (finding no bad faith when the plaintiffs “offered a
 5 satisfactory explanation” for the amendment). Understanding the purpose and scope of
 6 Plaintiffs’ proposed amendment is especially difficult here because Plaintiffs have to date
 7 refused to respond to AviaGames’ December 1, 2021 interrogatories, which asked Plaintiffs to
 8 identify each version of the purportedly infringed works, and to provide the legal and factual
 9 bases for their infringement allegations. Tung Decl. ¶ 7.² For these reasons, the Court should
 10 deny leave to substitute the ’926 Registration with the ’072 Registration.

11 **b. Plaintiffs’ Conclusory Allegation of Irreparable Harm is Futile**

12 The Court should deny Plaintiffs’ request to add an allegation of irreparable harm
 13 because there are no facts in the Complaint that support such a claim, and as such, it is
 14 implausible and futile. “Futility of amendment can, by itself, justify the denial of a motion for

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 16 ² Plaintiffs’ proposed amendment to replace a copyright registration for a “different work” is
 17 distinguishable from their cited authorities. Since receiving Plaintiffs’ December 1, 2021
 18 discovery requests, Plaintiffs have produced no documents and have not responded to basic
 19 interrogatories about the asserted works. Tung Decl. ¶ 7. In contrast, the cited authorities
 20 involve parties moving to amend that were transparent about the purpose and need for the
 21 amendment to the pleadings, and related discovery was provided. *See* Mot. at 7 (citing *Hodges*
 22 *v. Dutton*, No. 5:18-cv-04658-EJD, 2022 U.S. Dist. LEXIS 21697 (N.D. Cal. Feb. 7, 2022)
 23 (granting leave to amend where the plaintiffs have articulated the reason for asserting new
 24 claims, where the parties have engaged in limited discovery, and the plaintiffs offered to be re-
 25 deposited); *Sid Avery & Assocs., Inc. v. Pixels.com, LLC*, No. CV 18-10232-CJC(SSX), 2019 WL
 26 8806199 (C.D. Cal. June 24, 2019) (granting leave to amend where the plaintiff sought to
 27 remove copyright registrations for which it had no basis asserting, and add two asserted works it
 28 uncovered during discovery)).

1 leave to amend.” *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (affirming district
 2 court’s denial of motion to amend based on futility). An amendment is futile if the complaint
 3 would still fail to state a claim for relief under Rule 12(b)(6) standards if the amendment were
 4 allowed. *See Broidy Capital Mgmt., LLC v. Qatar*, 982 F.3d 582, 586 (9th Cir. 2020);
 5 *People.ai, Inc.*, 2022 U.S. Dist. LEXIS 14573, at *4-5 (on motion to amend, “[a]ll factual
 6 allegations rate as true, but legal conclusions merely couched as fact may be disregarded.”).
 7 Plaintiffs’ threadbare allegation of irreparable harm and injury is implausible and futile and
 8 cannot sustain a claim for injunctive relief.

9 Contrary to Plaintiffs’ statements in their motion, the proposed amendment does not
 10 “add supporting language” to assert an allegation of irreparable harm in support of injunctive
 11 relief. *See Mot.* at 6 n.1. Rather, Plaintiffs add only a bare recitation that “Defendant’s conduct
 12 and acts have caused and continue to cause irreparable harm to Plaintiffs, and will continue to
 13 do so unless enjoined by the Court. Plaintiffs have no adequate remedy at law.” *See Dkt.* 52-3
 14 ¶ 88. This conclusory allegation is unsupported by the facts alleged, which focus exclusively on
 15 monetary damages and accounting. *See Compl.* ¶¶ 86, 87 (seeking “damages, gains, profits, and
 16 advantages” and alleging “monetary loss to its business, reputation, and goodwill); Prayer ¶¶ E
 17 (seeking “full and complete accounting”), F (seeking “award of damages”). Plaintiffs’ single
 18 assertion that players of Bingo Clash have “mistakenly submitted their complaints to Skillz”
 19 does not establish, much less support an allegation of irreparable harm. *See Mot.* at 6 n.1 (citing
 20 *Compl.* ¶ 4). Likewise, Plaintiffs’ allegations that AviaGames has made “only minor cosmetic
 21 modifications” to the accused works in response to cease and desist letters does not support a
 22 conclusory allegation of irreparable harm when the result of the purported infringement is only
 23 Plaintiffs’ “fil[ing] this lawsuit” and seeking damages that are legally redressable. *See Mot.* at 6
 24 n.1 (citing *Compl.* ¶¶ 79-81). Moreover, despite Plaintiffs’ knowledge about AviaGames’
 25 purported infringement of the Skillz platform since September 2019, *Compl.* ¶ 79, Plaintiffs
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waited nearly two years to file the instant action in June 2021,³ rendering implausible any conclusion of irreparable harm. Plaintiffs' conclusory and factually unsupported assertion of irreparable harm is thus insufficient to state a claim for injunctive relief and should be denied as futile. *See Adams v. Haan*, No. SACV 20-913 JVS (DFMx), 2020 U.S. Dist. LEXIS 176002, at *9 (C.D. Cal. Sep. 3, 2020) ("[plaintiff's] conclusory statement about irreparable injury cannot survive a motion to dismiss").

Plaintiffs' authorities (*see* Mot. at 6 n.1) do not apply because neither involves a motion to amend with a threadbare allegation of irreparable harm. *See id.* (citing *Mahroom v. Best W. Int'l, Inc.*, No. C 07-2351 JF (HRL), 2009 U.S. Dist. LEXIS 11041, at *9-11 (N.D. Cal. Feb. 2, 2009) (denying the defendant's summary judgment motion as to the plaintiffs' request for injunctive relief after reviewing proffered evidence on irreparable harm to the plaintiffs' business) and *Broad. Music Inc. v. Anchor Ventures*, No. 2:15-cv-01003-SVW-AS, 2016 U.S. Dist. LEXIS 193822, at *14-15 (C.D. Cal. Nov. 17, 2016) (granting injunctive relief as part of an order granting default judgment)).

Because Plaintiffs' proposed amendment contains only a single conclusory allegation which fails under Rule 12(b)(6), the Court should deny it as implausible and futile. *See Broidy Capital Mgmt., LLC*, 982 F.3d at 586.

III. CONCLUSION

For these reasons, AviaGames respectfully requests that the Court deny Plaintiffs leave to amend as to the '072 Registration and the conclusory allegation of irreparable harm.

Dated: May 4, 2022

Respectfully submitted,

/s/ Erin Jones

Erin Jones

Attorneys for Defendant AviaGames Inc.

³ Plaintiffs assert they first learned of AviaGames' purported infringement of Blackout Bingo in September 2020, nearly a year before it sued. Compl. ¶ 80.